BAH HENG HONG SDN. BHD.

v.

THE PROVISIONAL LIQUIDATOR CHOONG SHIN CHEONG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[CIVIL SUIT NO. 22-740 OF 1987]
29 APRIL 1992

BANKRUPTCY: *Winding-up - Payment made to preferential creditors within the period of 6 months from the date when the winding-up petition was filed - Whether payment void.*

COMPANY LAW: *Forfeiture - After winding-up petition - Effect of.*

LANDLORD AND TENANT: *Relationship of landlord and tenant - Claim for damages by landlord - Whether landlord became creditors - Breach of tenancy agreement - Forfeiture of deposit termination of tenancy - Distress - Claim for arrears - Whether damages for holding over available.*

CIVIL PROCEDURE: *Summary judgment - Appeal against SAR's decision.*

The 1st defendant acting as liquidator demanded the sum of RM100,000 forfeited by the plaintiff under the tenancy agreement on the ground that it was payment to preferred creditors.

An O. 14 application by the 1st defendant against the plaintiff was allowed by the SAR. Hence, this appeal against the decision.

The 1st defendant contended that the plaintiff's act in forfeiting the sum of RM100,000 for breach of the tenancy agreement was within the 6 months period from the date when the winding-up petition against Maharani was filed.

Hence, the plaintiff's act should be deemed void since it was payment made to preferential creditor.

Secondly, the 1st defendant argument was based on the fact that plaintiff's claim *via* distress proceedings on or about 17 March 1987 against Maharani was arrears rental for the months of January, February and March 1987.

It was argued that if plaintiff had claimed for arrears of rental for March 1987, then the tenancy could not have been terminated on 12 February 1987 or 17 February 1987.

As a consequence, the 1st defendant's contended that the forfeiture after March 1987 would have been carried out after the winding-up petition was filed. Hence, the forfeiture by plaintiff would be void under s. 223 of the Companies Act.

In reply, plaintiff argued that at the time of termination of tenancy, the relationship of plaintiff and Maharani was not that of a debtor or creditor. Their relationship was that of a landlord and tenant.

As to the issue of the claim for arrears, the plaintiff argued that the claim for March was actually for damages for holding over.

Held:

[1] The moment the plaintiff claimed for damages they became creditors by virtue of the fact that they were entitled to damages for breach of contract.

[2] As such, plaintiff should be in the same rank as other creditors and any payment to them, which in this case was the act of forfeiture should be considered as payment to preferential creditors.

[3] Plaintiff's claim in the distress suit was for arrears of rental, including March 1987 such being the case, the tenancy would still be in existence for the month of March 1987.

[4] Forfeiture by the plaintiff of the RM100,000 deposit could, therefore only have taken place after March; this would be after the winding-up petition was filed. Therefore such forfeiture by the plaintiff is void under s. 223 of the Companies Act.

[Plaintiff's appeal dismissed with costs.]

Cases referred to:

Lian Keow Sdn. Bhd. (in Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 ***(foll)***

Robertson v. Grigg [1932] 47 CLR 257 ***(cit)***

Burns v. Stapleton [1959] 102 CLR 97 ***(cit)***

Legislation referred to:

Bankruptcy Act 1967, s. 53, (1)

Companies Act 1965, ss. 223, 293(1), (2)

Rules Of The High Court 1980, O. 14

For the appellants/plaintiffs - R.A. Kumar; M/s. Varughese, Kumar, Netto & Partners

For the respondent/1st defendant - A. Navamani; M/s. T.S. Chong & Co.

JUDGMENT

James Foong J:

This is an appeal against the Senior Assistant Registrar's decision dated 3 August 1991 where, she allowed an O. 14 application by the 1st defendant against the plaintiffs for the sum of RM100,000.

The facts of this case are as follows. The plaintiffs were the landlords of premises where one Koay Ah Kiew acting as agent for Maharani Supermarket Sdn. Bhd. (hereinafter referred to as Maharani), became the tenant. The tenancy agreement was for a period of 3 years but there were options for renewal making it a total term of 12 years.

Maharani paid a sum of RM100,000 to the plaintiffs under the said tenancy agreement as deposit for the due performance of all the convenants and conditions undertaken by Maharani while being a tenant of the said premises. Under Clause 5 (b) of the said tenancy agreement it is stated that, "In the event of termination of this tenancy by the tenant before the expiry of the terms hereby created, the said deposit of RM100,000 shall be forfeited ...".

Sometime in early part of 1987, Maharani were unable to pay their rent. On 12 February 1987, the plaintiffs alleged that they received a letter from Maharani's agent, the said Koay Ah Kiew, stating that the tenant wished to terminate the tenancy. Accordingly the plaintiffs forfeited Maharani's deposit of RM100,000 for breach of the terms and conditions of the tenancy agreement.

On 5 March 1987 a winding-up petition was filed against Maharani for their inability to pay debts. The 1st defendant was the provisional liquidator of Maharani.

The 1st defendant acting as liquidator now demanded the sum of RM100,000 forfeited by the plaintiffs under the tenancy agreement on the ground that it was payment to preferred creditors.

The 1st defendant contends that at the time the plaintiffs forfeited the sum of RM100,000 which was either on 12 February 1987 (the date Maharani wrote a letter to the plaintiffs to terminate the tenancy) or 17 February 1987 (when this letter of termination was alleged to be received by the plaintiffs), it was well within the period of 6 months from the date when the winding-up petition against Maharani was filed. Therefore under s. 293(1) of the Companies Act 1965 and s. 53(1) of the Bankruptcy Act 1967 and in line with the judgment of the Supreme Court in *Lian Keow Sdn. Bhd. (In liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors*. [1988] 2 MLJ 449, the plaintiffs' act should be deemed to be void since it was payment made to preferential creditors. As the 1st defendant is the liquidator, such payment should be refunded to them for their necessary actions.

The plaintiffs' reply to this contention is that in order to qualify as a preferential payment under s. 53(1) of the Bankruptcy Act 1967 and made applicable to s. 293(1) & (2) of the Companies Act, there must be about 5 conditions to be fulfilled. These are:

(a) that the transaction in question took place within 6 months prior to the commencement of the winding-up;

(b) that it satisfies the description of one of the types of transaction mentioned in s. 53(1) of the Bankruptcy Act;

(c) that it took place at a time when the company was insolvent;

(d) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and

(e) that the effect of the transaction was to confer on that person a preference priority or advantage over other creditors in the winding-up.

The learned Counsel for the plaintiffs submitted that only ground (d) has not been satisfied in this case. His reason is that at the time of the termination of the tenancy which was either on 12 February 1987 or 17 February 1987 the relationship between the plaintiffs and Maharani was not that of a debtor or creditor. Their relationship was that of a landlord and tenant. In such a relationship there was no past indebtness in respect of which the plaintiffs as landlord had obtained any benefit or advantage. The liability of Maharani in respect to the forfeiture of RM100,000 arose from a breach of the said tenancy agreement. Two Australian authorities namely *Roberston v. Grigg* [1932] 47 CLR 257 and *Burns v. Stapleton* [1959] 102 CLR 97 were cited in support.

I have considered the submissions of both Counsel and studied the authorities so cited. It is without doubt that the authorities cited expound sound law relating to this matter, particularly the existence of a debtor and creditor relationship is a prerequisite in order to qualify for s. 53 of the Bankruptcy Act.

However, after careful study of the facts and circumstances of this case, I find that the plaintiffs at the time they forfeited the sum of RM100,000 being deposit were no different from that of a creditor. Though their relationship with Maharani started off as that of a landlord and tenant but, when the tenancy agreement was terminated such relationship also came to an end. When the tenancy ended, the plaintiffs were entitled under the law to claim damages for breach of contract. In this case liquidated damages were clearly spelt out under the

tenancy agreement. This was the sum of RM100,000 deposit paid by Maharani to the plaintiffs. Therefore, the moment the plaintiffs claimed for damages they became creditors. They were creditors by virtue of the fact that they were entitled to damages for breach of contract. As such they should be in the same rank as other creditors and any payment to them, which in this case was the act of forfeiture should be considered as payment to preferential creditors.

The 1st defendant's Counsel in his submission also brought up another fact against the plaintiffs. This is based on a proceeding filed by the plaintiffs against Maharani on or about 17 March 1987, in the High Court at Muar for distress of arrears of rental due by Maharani to the plaintiffs. In this distress application the claim for arrears of rental stated therein was for the month of January, February and March 1987. It is submitted that if the plaintiffs had claimed against Maharani for arrears of rental for the month of March 1987 then the tenancy could not have been terminated on 12 February 1987 or 17 February 1987. If this tenancy was not terminated on such periods then any forfeiture after the month of March 1987 would have been carried out after the winding-up petition was filed (which was 5 March 1987). Under such circumstances the forfeiture by the plaintiffs would be void under s. 223 of the Companies Act for such a transaction was carried out after the filing of the winding-up petition.

The plaintiffs attempted to explain out of this situation by stating that the claim for arrears of rental for the month of March 1987 in their distress proceeding in Muar High Court was a wrong usage of term. The claim for March rental was actually for damages for holding over of the said premises during the month of March 1987 when the tenancy was terminated on 12 February 1987.

I cannot fanthom such an explanation advanced by the plaintiffs. The Distress Act 1951 clearly provides for claims of arrears of rental. There are no provisions whatsoever therein to provide for distress on damages. The plaintiffs themselves have clearly and expressly used the word "rental" in their distress proceeding and I do not think it can mean any other thing except what the word "rental" is meant to mean.

"Damages for holding over" may be a type of damages for breach of tenancy but, in this case, liquidated damages are already provided for under the terms of the tenancy agreement. Therefore what was the purpose of the plaintiffs' claim for "damages for holding over" when their claim for damages was already defined.

I find that the plaintiffs' claim in the distress suit was for arrears of rental, including the month of March 1987. Such being the case, the tenancy of the said premises would still be in existence for the month of March 1987. Forfeiture by the plaintiffs of the RM100,000 deposit could, therefore only have taken place after the month of March; this would be after the winding-up petition was filed. Therefore such forfeiture by the plaintiffs is void under s. 223 of the Companies Act.

In view of the aforesaid, I dismissed the plaintiffs' appeal against the Senior Assistant Registrar's decision with costs.

Also found at [1992] 3 CLJ 1421